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No. 01-206

Supreme Court, U.S.
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In The

# Supreme Court of the United States

JOHN D. SZABO, doing business as ZATRON, on behalf of himself and all others similarly situated,

*Petitioner,*

v.

BRIDGEPORT MACHINES, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITIONER'S REPLY BRIEF

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## I.

## REVIEW SHOULD BE EXERCISED NOW.

Bridgeport first asserts that Mr. Szabo has not set forth compelling reasons for this Court to grant the Petition and that it consequently fails to satisfy Supreme Court Rule 11. (Brief in Opp. at 1). Rule 11, however, is simply not applicable: the Seventh Circuit has already ruled, vacating the class certification decision and remanding the case to the district court. Thus, Mr. Szabo is not seeking review of "a case pending in a United States court of appeals, before judgment is entered in that court." S. Ct. R. 11.[1]

Bridgeport also argues that this case is not ripe for consideration because it was remanded to the district court. (Brief in Opp. at 2). This Court has indicated that it normally will not review decisions of the lower courts prior to final judgment,[2] but that principle is not absolute. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Instead, "where there is an important and clear-cut issue of law that is fundamental to the further

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[1] Rule 11 is instead intended for cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952), in which certiorari is sought after an appeal has been docketed, but before the court of appeals has rendered a decision. *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* at 199 (7th ed. 1993).

[2] *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967); *see also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

conduct of the case, and that would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review." *Randolph Central School Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting from denial of certiorari).

Consequently, neither the remand by the court of appeals nor the bench trial scheduled by the trial court precludes review of the question presented. In *Land* and *Larson*, the procedural posture was similar. There, the Court granted certiorari to review decisions raising important jurisdictional questions, where the court of appeals had reversed the granting of a motion to dismiss and had ordered the case remanded for trial. *Land*, 330 U.S. at 734; *Larson*, 337 U.S. at 685. In *General Motors Corp.*, the case had been remanded for trial by the court of appeals. Nevertheless, this Court granted certiorari, as the circuit court ruling was "fundamental to the further conduct of the case." 323 U.S. at 377. In *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959), this Court granted review where a court of appeals refused to issue a writ of mandamus that would have required the district court to hold a jury trial.[3] *Id.* at 501; *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 380-81 (1970) (review granted prior to trial to consider whether court of appeals misapplied prior Supreme Court precedent).

In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 159 (1974), a decision implicated by the question presented, this Court granted certiorari to address "difficulties" that

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[3] (*See* Pet. at 26-27) (discussing the impact of the Seventh Circuit's decision in this case on the right to a jury trial).

had arisen in the application of Rule 23, although the action had not yet reached the stage where a final judgment on the merits had been entered. Therefore, certiorari has been granted where a case presented a novel and important question of law and where the petitioner's position, if sustained, would render the decision wholly void. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).

Here, the question presented is fundamental to the further conduct of this case. The class certification bench trial has been scheduled because the court of appeals directed the district court to resolve disputed factual issues relating to the merits of Mr. Szabo's claims if those issues are also relevant to Rule 23's criteria. (App. at 7-8). If the court of appeals improperly vacated the district court's class certification order, than the bench trial that the court has scheduled is unnecessary. The question presented is not only fundamental to the further conduct of the case, it is appropriate for certiorari, because of existing conflicts among the courts of appeals and because of its importance to judicial administration. (Pet. at 16-27).

And if this Court does not grant review now, there is a substantial risk that the propriety of the Seventh Circuit's decision will escape review: Once the district court conducts the bench trial, the focus of any subsequent appellate review will necessarily shift to whether it properly applied Rule 23's criteria to the evidentiary record before it, not whether it abused its discretion in the original class certification decision.

## II.

## THE QUESTION PRESENTED IS RAISED BY THE DECISION OF THE COURT OF APPEALS.

Bridgeport insists that Mr. Szabo is raising a question that is not presented by the record or the Seventh Circuit's decision, asserting that the real issue is the trial court's refusal to consider Bridgeport's evidence. (Brief in Opp. at 2-4). This contention distorts the record. The trial judge plainly considered Bridgeport's contentions and its evidence. (App. at 59-60 n.2). The court simply refused to give Bridgeport's assertions the dispositive weight that defendant sought. (App. at 60) ("Moreover, in many instances where Bridgeport claims that the court must accept its version of the facts as true, the facts were not relevant to the issue."). And while Bridgeport asserts that its evidence was not refuted, the record demonstrates that plaintiff submitted contrary evidence, including evidence that Mr. Szabo relied on Bridgeport's written representations in its brochure and in the written contract. (*See* Pet. at 6-7, 12-13 n.6). The record also shows that Mr. Szabo challenged the competency of Bridgeport's evidence. (*See* Pet. at 4, 13 n.7).

## III.

## THE QUESTION PRESENTED IS APPROPRIATE FOR REVIEW.

Bridgeport also asserts that the decision below does not conflict with any decision of this Court or any court of appeals. To sustain this contention, Bridgeport labors to show that the Second, Ninth and Tenth Circuits have not held that district courts should accept the substantive

allegations of the complaint in ruling on class certification motions. A cursory examination of district court opinions shows Bridgeport to be in error. *See Weil v. The Long Island Savings Bank*, 200 F.R.D. 164, 168 (E.D.N.Y. 2001) ("When applying Rule 23, courts should accept all allegations in the complaint as true."); *O'Connor v. Boeing North American, Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000) (noting Ninth Circuit precedent directing that the substantive allegations of the complaint be accepted in ruling on a class certification motion).

Moreover, even in cases where district courts exercise their discretion to treat class issues on a highly developed evidentiary record, precedent from other circuits directs that they avoid reaching ultimate issues of fact that relate to the merits. *See Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 293 (CA2 1999) (district court's refusal to grant class certification was error as it improperly decided to credit defendant's evidence over plaintiffs' evidence).

The Third Circuit's recent decision of *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 2001 U.S. App. LEXIS 17424 (CA3 2001), which Bridgeport cites, is similar. In *Newton*, the inquiry into the merits involved an evaluation of how the case would be presented, not a resolution of disputed factual issues that related to the merits. The *Newton* Court refused to address the ultimate merits of reliance issues, despite evidence that there was some public disclosure of the deceptive business practices that were at issue. 2001 U.S. App. LEXIS 17424 at *41-*44. The Third Circuit affirmed the denial of class certification in *Newton* because it concluded that millions of securities trades would need to be

evaluated individually to determine whether a class member had suffered any injury. 2001 U.S. App. LEXIS 17424 at *85.

## CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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